In the Supreme Court of the United States.

Postal Telegraph-Cable Company,
Plaintiff in Error,

against

The Borough of New Hope,
Defendant in Error.

October Term, 1903.

No. 92.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania. The action was commenced in the Court of Common Pleas of Bucks County, Pennsylvania, which entered judgment against the plaintiff in error, upon the verdict of a jury, and which judgment was in turn affirmed by the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania.

The Borough of New Hope enacted an ordinance requiring all telegraph companies maintaining poles and wires within the borough limits to pay an annual license fee of one dollar ($1) for each pole, and two and one-half dollars ($2.50) for each mile of wire maintained. This action was brought to recover such license charge or tax for the five years beginning October 1, 1895, and ending October 1, 1899, upon the poles and wires of the plaintiff in error.

The defense was that the plaintiff in error was a corporation of the State of New York, and had paid to the Commonwealth of Pennsylvania all taxes upon the value of its poles and wires maintained in the Borough of New Hope; that it had accepted the Act of Congress of July 24, 1866; that the poles and wires were used for the transmission of telegraphic messages of the United States Government; that the highways upon which the poles and wires were constructed and operated are post roads and post routes, and said poles and wires constitute a part of the interstate telegraph system of the plaintiff in error, beginning in New York city and extending through several states to the city of New Orleans, with a branch from the city of Philadelphia to the city of Chicago, and known as through circuits; that the tax is illegal because it is a burden upon and regulation of interstate commerce, and, as such, prohibited by the commerce clause of the Constitution of the United States. The further defense was made that the borough authorities did nothing whatever in the way of making inspection of this telegraph line, and during the period sued for had made no payments or disbursements whatever for inspecting or regulating the same. The further defense was made that the assessment of such license fees or taxes was for the sole purpose of raising revenue, and that the amount of the same was more than seventeen per cent. per annum upon the entire cost or value of that part of the line in the said Borough of New Hope.

At the time of the trial the defendant called Mr. Charles C. Adams, its superintendent, at Philadelphia, included within whose jurisdiction was the County of Bucks, who testified to his knowledge of the poles and wires in question, and described their location, as above set forth, and that—

Q. Mr. Adams, what is the value of the entire line of the Postal Telegraph-Cable Company in the Borough of New Hope?

A. It is less than $800.

Q. Can you show how that calculation is arrived at?

A. I can.

Q. Just tell us.

A. The items of the cost of construction are as follows: 68 poles at $3 a pole, delivered, amounting to $204, and allowing $2.50 per pole for labor in the erection of the poles, including the cost of cross-arms and pin, $170; 28 miles of iron wire at $18 per mile, $336, and the labor of stringing the wire at $2.50 per mile, $70; making a total of $780.

Q. The claim of the plaintiff here is $138 per year. What per cent. of the cost of the line, the value, is that?

A. That would be about 17 per cent.

(Record, pages 30 and 31.)

The defendant also called Thomas O'Rourke, its lineman at New Hope, employed by it since 1882, who testified as follow:

Q. Since 1882, what have been your duties concerning this line of telegraph in New Hope?

A. To keep up the line as lineman, repairman and test operator.

Q. So that during all that time you have been engaged for the defendant in inspecting and regulating its poles and wires?

A. Yes, sir.

Q. You stated that you had been constantly employed along this line in the borough?

A. Yes, sir.

Q. Do the borough authorities do anything whatever in the way of inspection of this line?

A. No, sir.

(Record, pages 31 and 32.)

The defendant also called David Cunningham, the Secretary of the Council of the Borough of New Hope since October, 1894, who testified as follows:

Q. Since October, 1894, has the Borough of New Hope made any payments or disbursements for inspection or regulating the line of telegraph for (of) the Postal Telegraph Company?

A. No, sir.

The only witness called by the plaintiff, who furnished any evidence whatever as to any work done on behalf of the borough by reason of this telegraph line being built therein, was John Markey, the Assessor, and this was developed in cross-examination. Upon this point he testified as follows:

Q. When did you get this information? when did you count these poles and measure these wires?

A. I have counted those poles since 1894, every year.

Q. You have counted them every year?

A. Yes, sir.

Q. And measured them every year?

A. No, sir. I have measured them this year.

Q. How long have you been Assessor?

A. Eight years.

Q. Did you ever perform any other duty in connection with telegraph poles and wires?

A. What do you mean?

Q. Did you ever do anything else?

A. Yes, I worked.

Q. In connection with the poles and wires of the telegraph company?

A. No, I don't think I did, only in making the borough assessment.

Q. But I am talking about poles and wires of the telegraph company. You never did anything except count them once a year, and this last time measured them?

A. Yes, that is all.

(Record, page 29.)

Under the above facts, which constituted practically all of the testimony in the case, the trial Judge submitted it to the jury for its determination as to whether or not the ordinance was excessive or reasonable.

The plaintiff's claim was to recover the sum of five hundred and fifty-two dollars ($552), with interest thereon. (Record, page 22.)

The verdict of the jury, rendered October 17, 1899, was four hundred and sixty-six dollars and forty cents ($466.40) (Record, page 20), and from the judgment entered thereon this appeal has been taken.

SPECIFICATIONS OF ERROR.

(1) The learned judge who tried the cause erred in refusing the third point submitted by the said defendant, which third point was as follows:

> "Evidence in this case shows that the amount of license fee sought to be imposed upon the defendant is excessive in amount, and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant."

The answer of the learned Judge thereto being as follows: "Refused."

(2) The learned Supreme Court erred in affirming the judgment of the Superior Court of Pennsylvania.

(3) The learned Supreme Court erred in not reversing the judgment of the Superior Court of Pennsylvania.

ARGUMENT.

This case was tried in the Court of Common Pleas of Bucks County, immediately before the case of the Borough of New Hope against the Western Union Telegraph Company, which has since been decided by this Court (187

U. S. 419). In rendering its decision in that case, it is respectfully submitted that this Court was entirely guided by the fact that the Appellate Courts of Pennsylvania had, in a long line of cases, held similar amounts of license fees to be reasonable, and that their conclusion was not so manifestly wrong as to justify the interposition of this Court. In that case three of the learned Judges dissented, and shortly thereafter the case of the Atlantic and Pacific Telegraph Company against the city of Philadelphia was argued, and decided June 1, 1903 (190 U. S. 817), and the entire subject reviewed to a very much greater extent, and rules laid down for the purpose of guiding the lower Court as to when the question of reasonableness should be passed upon by it, and when, by reason of a conflict of testimony, the question of reasonableness of the charge should be submitted to a jury.

Inasmuch as the jury in this case rendered a verdict for an amount less than the plaintiff's claim, it showed conclusively that in its opinion the charges imposed were to some extent at least excessive, and this being so, it is respectfully submitted that the verdict cannot stand, because it should have been in the full amount of the claim, or for the defendant. While the Borough Council may, in the exercise of its police powers, have the right to impose a license fee or charge upon telegraph poles and wires, and it is in the first instance presumed to be reasonable, nevertheless a jury has no such power and cannot change the rate.

In charging the jury in this case the lower Court said:

> "The Court confesses that it has a great deal of doubt as a matter of fact and law as to whether it is a reasonable subjection or not. We are frank to say that we are inclined to the view that this is an arbitrary imposition of a license or tax rate. . . . (Record, page 33.)
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> "Now, then, gentlemen, while the question as to whether an ordinance is reasonable or not is

> for the Court, and the Court does not propose to evade that question, yet I have concluded to obtain the assistance and judgment of this jury as to whether an assessment such as this is, under the circumstances of this case, is reasonable or unreasonable under the law, as I have laid it down, for this surely involves the facts." (Record, page 34.)

It was undoubtedly, therefore, the opinion of the trial Judge that upon the undisputed facts he personally considered that these fees amounted to a tax for revenue, but that he felt bound by the numerous decisions of the Appellate Courts, and therefore submitted the case to the jury instead of determining it himself.

In the case of the Atlantic & Pacific Telegraph Company against the City of Philadelphia, 190 U. S. 817, *supra*, this Court said:

> "It may be conceded that, generally speaking, whether an ordinance be reasonable is a question for the Court."

As said by Judge Dillon, in his work on Municipal Corporations (4th ed. Vol. I, Sec. 327):

> "Whether an ordinance be reasonable and consistent with the law or not *is a question for the Court*, and not the jury, and evidence to the latter on this subject is inadmissible. While that may be correct as a general statement of law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. . . . The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of a jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the Court might be justified in directing a verdict.

In the case of the City of Philadelphia against the Western Union Telegraph Company, 89 Fed. Rep. 454, Mr. Justice Shiras, upon this particular question, said:

> "When it is said, in some of the cases, that such a question is for the determination of the Court, it is not meant that the question may not properly be sumbitted to a jury. What is meant by such observations is that Courts are not precluded upon considering the reasonableness of the legislative act prescribing the terms and amount of the charges."

While under the facts in the last decided case by this Court, it was held that it should have been submitted to a jury, yet the Court pointed out numerous facts which were to be taken into consideration, which were developed by the testimony offered, by reason of which the reasonableness or not of the charges should be determined by the jury. In the case at hand there was not one single disputed fact.

The effect of a decision in favor of the reasonableness of the charge imposed in this case would be that the amount thereof will, under all circumstances, be considered reasonable. If the charges imposed had been ten times as much as they actually are, it is impossible to conceive how stronger testimony could have been produced, to show that the same were unreasonable, and yet it probably would be conceded that such an amount would be excessive. There was, in other words, nothing to guide the jury, which in any way would allow it to say from the testimony that these charges were proper and not excessive; and therefore the Court itself should have followed its own expressed ideas, and held the ordinance void, because the charges were so unreasonable as to make them amount to a revenue measure. On the contrary, the undisputed testimony not only showed no expense whatever, imposed upon the borough, by reason of this telegraph line being constructed

within its limits ; but, on the contrary, the charges amounted to such an annual per cent. (more than seventeen) upon the entire value of the telegraph line within the borough as to become a rate of charge, which no community in the whole United States would attempt to impose even for revenue purposes, without grave danger of an uprising of the people. The wisdom of the Court assuming such power is shown by the guesswork of this particular jury, in rendering a verdict for a portion of the amount claimed, and thereby undertaking to set itself up as the tribunal which could fix the rate.

If the facts in this case are not sufficient to warrant the Court determining that the amount of the charges imposed are so unreasonable as to make the ordinance void, it is respectfully submitted it will be impossible to avoid making payment of whatever amount the Council of a small borough might see fit to impose.

It appears as a fact, in another case immediately succeeding this in number (Postal Telegraph-Cable Company against Borough of Taylor, United States Supreme Court, October Term, 1903, No. 93), that these charges imposed upon this company would amount to more than one hundred thousand dollars ($100,000) per annum, in the State of Pennsylvania alone, if they are held to be a standard rate, which at all times shall be considered reasonable. If the same charges are imposed by the boroughs and municipalities of all the States, they will amount to millions of dollars per year, and certainly must become a burden upon interstate commerce, and affect the entire people of the United States. There can be but one result to follow, which would be the material raising of the prices charged for telegraphic messages, or the telegraph companies will be forced out of business altogether, in order to avoid becoming insolvent.

The importance of this subject has materially grown within the last few years, during which time ordinances such as the one in this case have continued to be passed by the councils of the boroughs and cities. While the facts in this case may not vary materially from those in the case of the Western Union Telegraph Company against the same borough, *supra*, nevertheless this same point, as to whether or not the Court should have submitted the case to the jury, or have directed a verdict for the defendant, was not argued or discussed in the opinion of the Court. There is, therefore, no necessity existing for this Court to reverse its decree in the other case, should it now hold that the judgment here must be reversed because of the error of the Court below in submitting it to the determination of the jury.

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